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# **REDISTRICTING IN ILLINOIS**

**By: John S. Jackson and  
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## **Redistricting in Illinois**

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### **Introduction**

Redistricting in Illinois is a challenging and contentious political game which must be played every ten years. The rules of the game consist of a maze of federal constitutional and legal requirements supplemented by the constitution and laws of the state of Illinois. The national laws provide a legal framework within which Illinois lawmakers must work as they redraw the map for the congressional and state legislative districts to meet the new population count every decade. Within the parameters provided to the state by federal law and court rulings, Illinois is like every other state and must meet the same requirements imposed on every state by the superiority of federal law and the national constitution. However, like most other things in the political sphere, Illinois has its own unique history and political culture and its own way of meeting the challenge. Our constitution, for example, is unique in the provision of the tie breaker system for breaking out of an impasse between the two parties. The very competitive political culture in Illinois, with our two almost equally matched parties, ensures that the decennial redistricting game will be very hard fought and closely matched, often going into the “overtime” provided by the tie breaker provision in the constitution, and often then challenged further in the courts. This paper details some of the major provisions, in both law and politics, for the redistricting process in Illinois and nationally.

### **Terminology**

One should begin this discussion with a clear understanding of the basic terms. The two terms, “reapportionment” and “redistricting” are often used to describe the same process and sometimes used interchangeably. They are part and parcel of the same process; however, they are two distinct terms. “Reapportionment” is exclusively the province of the national government. It is the act of assigning to each state every ten years the number of seats in the U. S. House of Representatives that state will be entitled to based on its proportion of the total U. S. population as reflected in the census. This obligation is found in Article I, Section 2 of the U. S. Constitution. This exercise is also necessary because the size of the U. S. House has been fixed, by federal law, at 435 members since 1910. Before that, the House was allowed to grow in size as the nation grew and new states were admitted. Since then, each new state has been carved out of the 435 total, and each decade’s reapportionment has been a zero-sum game where the states which gained substantial population were given more seats and the states which lost population were penalized with a loss in seats. The only exception to this rule is that each state, no matter how small, is entitled to one member of the House. This means that the very small states are actually overrepresented in the House given the norm for the population which is required to warrant one House seat. That is, after the 1990 Census, each member of the House represented, on average, 572,466 people. By 2000 this figure had grown to 646,952 for the average Congressional District. Each House seat, then, must come as close as possible to that average, except in the case of the very small states and their representation. In summary, reapportionment is strictly a federal issue pertaining to the U. S. House only, and it is not really relevant at the state house and senate levels except for the rare occasions when a state may be changing the size of its legislature.

“Redistricting” is drawing the boundaries of the legislative districts inside the states. It is relevant for the U. S. House elections as well as for both houses of the state legislature. It is the process which is set in motion by the U. S. Census and by the resulting assignment of the number of House seats to each state. It is also triggered by the census for the drawing of the boundaries within the state for representation in the Illinois House and the Illinois Senate. Thus, redistricting is relevant at both the state and national levels, involves much more room for discretion, and it is thus much more complicated and more controversial than the reapportionment process. It is the redistricting process that is primarily the focus of this paper.

### **The Most Relevant Case Law**

In this section we will provide the most relevant and most recent case law controlling the redistricting process in the states. There are numerous pertinent cases if the entire legal picture is painted so we will simply focus on the most important

landmark cases which control the legal environment as of 2005. The starting place is an Illinois case, *Colegrove v. Green*, 328 U. S. 549, decided in 1946. Colegrove was a political scientist at Northwestern University in Evanston. He sued the state of Illinois which had not redistricted the state's General Assembly since 1910 despite a clear requirement under the Illinois and the national constitution that such redistricting should take place every ten years. Colegrove lived in the 7th Congressional District, which at that time had a population of 914,000 and there were many Illinois Congressional Districts, which had far fewer people. A rural southern Illinois Congressional District, for example, had only 112,116 people at that time. (Cushman and Cushman, 1960, 828; Butler and Cain, 1992, 26-27). In this failure to redistrict every ten years, Illinois was certainly not alone. In fact, most state legislatures had found it politically inexpedient, or politically impossible, to make sure the remap followed the census changes every decade. This meant, in most instances, a clear disparity of power where the rural legislatures continued to control power to the disadvantage of the more populous urban dwellers. Professor Colegrove maintained that this failure was a clear violation of the U. S. Constitution's "equal protection" clause of the Fourteenth Amendment. One might have thought that Colegrove had a prime facie case; however, the U. S. Supreme Court, by a 4 to 3 margin, disagreed. Justice Felix Frankfurter argued that this was a "political thicket" which the court did not want to enter, and that the remedy was for the legislatures to take care of their constitutional obligations. Of course, this was asking for the very people who had refused to follow the law and the constitution to somehow get religion and take action that could well eliminate some of their jobs. The Illinois legislators, and most of the rest of the other legislators throughout the United States, refused to follow the hortatory language of the Colegrove case, and the assignment of redistricting cases to the category of "political questions" which the Supreme Court would not hear, of course, left the underrepresented voters, mostly urban voters, lost in that political thicket.

*Colegrove v. Green* remained the controlling case law until the more activist Warren court overruled it in 1962. In the case of *Baker v. Carr* 369 U. S. 186, a majority of the U. S. Supreme Court in effect voted to overturn Colegrove by holding that the question of redistricting at the state and federal level was a "justiciable" question which they could rule on. This was a case out of Tennessee where the state legislature had refused to redistrict since 1901. Inevitably population changes had produced extreme variations between the largest and the smallest districts. The court's majority held that there were basic political rights involved here and there were legitimate Fourteenth Amendment equal protection considerations that the court was obligated to hear. The next year in *Gray v. Sanders* 372 U. S. 368 (1963) Justice Douglas, writing for the court announced for the first time its now famous "one person, one vote" rule of thumb by which it intended to decide future cases. In subsequent cases the court then began the arduous process of spelling out just how equal in population each district had to be and how to achieve that equality in the state legislatures and in Congress. The standards have been somewhat different for the state legislature compared to the Congress.

In two landmark cases decided in 1964 the court took the first steps toward spelling out the remaining answers regarding both the U. S. House of Representatives and the two houses of each state legislature. In the case of *Reynolds v. Sims* 377 U. S. 533, the court applied the one person one vote standard to both houses of the Alabama state legislature. They rejected the argument that at least one house, usually the senate of the state legislature, could be based on political subdivisions such as counties on the model of the states' equal representation in the U. S. Senate. The court said in effect that equal population was required for both houses of the state legislatures. Chief Justice Warren, writing for the court said, "...mathematical nicety is not a constitutional requisite", however, "the overriding objective must be a substantial equality of population among the various districts". In many subsequent decisions, the court has attempted to refine and spelled out the details of that expectation of "substantial equality".

For a number of years the court allowed significant population variation at the state level that they would not allow at the national level. At the state level for over two decades the standard of population equality could be interpreted as allowing up to 10 percent variation (plus or minus 5 percent each way) for some districts. (*Brown v. Thompson* 462 U. S. 835 1983). That seemed to be the clear constitutional standard for the guidance of state legislatures for two decades. However, in a 2003 case, a three-judge federal panel seemed to narrow that variance considerably. In a case out of Georgia, *Larios v. Cox*, 306 F. Supp. 2nd 1214, the court accepted a plan with a variance across districts of just under 2 percent (1.95 for the house and 1.91 for the senate). The court allowed this plan to stand as an acceptable definition of what the "one person, one vote" standard required for the two houses of the Georgia state legislature. The three-judge federal panel had directed a Special Master to draw up the plan which was ultimately accepted. The court directed the Special Master to comply with the U. S. Constitution and Articles 2 and 5 of the 1965 Voting Rights Act, and "to apply Georgia's traditional redistricting principles

of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest” (Larios v. Cox, N. D., GA, No 1:03-CV-693-CAP, March 15, 2004). The U. S. Supreme Court affirmed the order of the three-judge panel (Cox v. Larios, 542 U. S.) These cases seem to raise a whole new and much stricter population standard for state legislative districts than had been in effect for twenty years under Brown v. Thompson.

The standard for the U. S. House of Representatives has always been much more stringent since the 1964 ruling of Wesberry v. Sanders 376 U. S. 1. The court has held that this is a Fourteenth Amendment “equal protection of the laws” matter, and their definition of what “equality” requires in population equality has been very strict. That is, they have demanded virtual population equality for House districts with almost no deviation allowed. They have been presented with various plans, many of which had narrow ranges of deviation, none of which have proved to be acceptable if they deviate from the absolute population equality they have set as a standard. So, while the court will allow for several other criteria to be employed in both federal and state questions, they have been very stringent on the population equality matter at the federal level and the allowable state deviations seem to have narrowed significantly in 2004.

### **The Additional Criteria**

Those other criteria that are allowable are explored in the next section of this paper. Other than virtual equality of population, what are the other criteria various federal courts have allowed and what are the criteria other experts and scholars have included that may constitute relevant and acceptable objectives in the redistricting process? Writing about the long history of this controversy and after reviewing the literature on this subject two major scholars in the field provided the following list of six propositions as to what goals could be pursued in the redistricting process:

#### **Considerations Involving Form**

1. Equal numbers- Congressional districts should be as equal in number as possible.
2. Natural frontiers- Congressional districts should conform, where possible, to local boundaries, communities of interest, and lines of communication.
3. Compactness and contiguity- Congressional districts should be as geographically compact as possible, and no part should be completely unconnected with the rest of the district.

#### **Considerations Involving Outcome**

4. Party fairness- Congressional districts should be drawn to be as fair as possible between parties
5. Ethnic fairness- Congressional districts should be drawn so that ethnic or other minorities have an equitable chance of representation.
6. Party competition- Congressional districts should foster party competition and alternation.” (Butler and Cain, 1992, 65-66)

The first three criteria are more technical in nature, and we have already discussed the equal numbers item. The “community of interest” criterion is of significant interest and has proven to be difficult to define objectively. It can mean that currently existing governmental subdivisions need to be protected, which is relatively objective; however, it can also refer to socio-economic, ethnic, and racial homogeneity. Some have even suggested that modern media markets should be considered when defining this somewhat elusive concept. Community of interest has much promise to provide for values that local advocates want to preserve; however, it has not been spelled out with much clarity by the courts.

The criteria above include the “compact and contiguous” shape of the district.

”Contiguous” is relatively objective and easily defined as the requirement that one must be able to connect any point in the district with any other point. Although there is some controversy regarding irregular geographic features such as intervening bodies of water, coast lines, islands, etc. this rule is generally understood and followed. With those exceptions, that criterion is not a major source of litigation. Compactness requires regular geometric shapes without a lot of long jagged lines and oddly shaped extensions to the district. Districts with strange and irregular shapes automatically conjure up the suspicion that other considerations such as partisanship, or protection of the incumbent, are at work. Indeed the traditional term “ger-

rymander” derived from 18th century America and a district with a very bazaar shape, devised by Governor Elbridge Gerry of Massachusetts, and derisively described as looking like a “salamander” was the source of the term. Pictures of that strange first gerrymandered district are routinely found in leading political textbooks today (Schmidt, Shelley and Bardes, 1999,396). Compactness is a concept not easily defined, and it is a rule often violated in the real world of redistricting politics. The contiguous rule lends itself to relatively definitive assessment whereas the matter of compactness lies more in the eye of the beholder, or the coalition having effective political power in the state at the time of redistricting. Thus, the congressional districts drawn in the State of Illinois after the 2000 Census were contiguous, barely; however, they could be described as “compact” only if one adopted a very generous definition of what that term may mean.

The other criteria which can be considered, in varying degrees of weight, include incumbency, the racial make-up of the district (especially the so-called “majority-minority” districts), partisanship, the existence of “communities of interest”, and a due regard for existing political subdivisions. Indeed, one operational definition of a community of interest is to respect existing political subdivisions such as city limits, county lines, etc. The idea of geographical unit representation is deeply embedded in the American political culture and the concept here is that a geographical unit of government also shares some other important interests which the representative should be able to look after in Springfield and Washington. Unfortunately, that ideal is not always attainable when the overriding concern has to be equality of population first and foremost. Thus many existing political sub-division boundaries are violated or ignored as the map-makers have sought to achieve technical equality as well as pursued other political calculations in redistricting; however, most observers automatically conjure up some suspicion of partisan gerrymandering in operation when they see prominent governmental subdivisions divided in the deals which are done to get a map drawn. Other definitions of “communities of interest” have been considered, such as following natural boundaries along rivers, following the contours of media markets, preserving certain racial, socio-economic and demographic characteristics in the drawing of the map; however, none is so widely recognized and pervasive as the desire to protect existing governmental unit boundaries. Only the racial or ethnic category is widely recognized and preserved. That story is so complex and so decisive in some districts as to warrant separate treatment.

### **Ethnic Fairness and The Majority-Minority conflict**

Race has always been a divisive matter in American politics and the conflicts engendered by racial matters have been difficult for the political system to process. Not surprisingly, then, the managing of representation for minorities has produced many significant court cases. We will not exhaustively review all of those here; however, we will attempt to present an overview of the most salient points. The first legal attempt to deal with the politics of race was the passage of the “Civil War Amendments” i. e. the Thirteenth, Fourteenth, and Fifteenth Amendments. The Thirteenth freed the former slaves and abolished slavery in the United States. The Fourteenth provided the former slaves with citizenship and the rights of citizenship, including most notably the right to due process of law and the equal protection of the laws. The Fifteenth Amendment gave the right to vote to the former slaves. Three constitutional amendments would seem to be adequate to address the problem and the end of the issue; however, as the so-called “Jim Crow” legislation of the 1880-1890 era demonstrated, this was not to be the case and the South, as well as much of the rest of the nation, quickly developed an intricate web of laws and informal cultural practices which effectively disenfranchised the African-American population and created a *de jure* form of segregation which dominated American life until well into the 1960’s. The subsequent legislation and court cases are the modern American attempts to work out its racial problems and to provide some institutional mechanisms to ensure representation for minorities, especially African-Americans. The most important court cases rely on the Fourteenth and Fifteenth Amendments as their major rationale.

The major legislation in the field is the Voting Rights Act of 1965, with its amendments of 1970 and 1982. The Voting Rights Act of 1965 was the quest of Lyndon Johnson and his administration to fulfill the promise of the Fourteenth and Fifteenth Amendments. It provided that African-Americans should have the right to vote, free of any harassment or discrimination by local officials, and it placed the might of the federal government, in the form of the U. S. Department of Justice, firmly behind the enforcement of practical measures to ensure that this right was not abridged. It prohibited states from imposing voter qualifications (literacy tests, etc.) which could dilute or abridge this right and it gave the Department of Justice the obligation to supervise elections in the states where there had been a clear record of past discrimination. It especially gave the Department of Justice the obligation to “pre-clear” in the covered states any proposed changes in their voting procedures in order to ensure that those changes were not designed to hamper the voting rights of African-Americans. The

1970 amendments made the ban on discriminatory tests and practices apply nation-wide. The amendments of 1982 specified that changes in voting procedures could be challenged even if there was not demonstrable “intent to discriminate” inherent in the changes (National Conference of State Legislatures, 1999, Chapter 4). They established a “totality of circumstances” test to determine whether a practice or procedure resulted in the abridgement of voting rights.

It is primarily the 1982 amendments that the U. S. Department of Justice then interpreted and used to institute a series of steps which required the establishment of what are now called “majority-minority” districts. Those districts are exactly what the name suggests, i.e. Congressional Districts drawn to ensure that minorities, notably African-Americans, have enough of a majority in the district beforehand to almost guarantee that an African-American will be elected to Congress from that district. Where Hispanic voters are geographically concentrated in adequate numbers, they have also been given the protections of the Voting Rights Act and guaranteed representation in Majority-Minority districts. In addition, this is the only case where the standard adopted for base measurement has not been the raw population numbers. The Department of Justice, instead, took into consideration the fact that minorities tend to vote at a somewhat lower rate so the districts were frequently required to have as much as sixty percent, or more, African-American population to pass muster. After the 1990 census the Department of Justice assumed the right of “pre-clearance” of all state redistricting plans in order to ensure that their directives regarding “majority-minority” districts were being followed.

Not surprisingly, this decision by the Department of Justice created great political conflict and a raft of court cases. The conflict is still being worked out today. The resulting actions of state legislatures in drawing up their new congressional district boundaries were often ingenious as they attempted, whether legitimately or not, to meet the Justice Department requirements and get their maps cleared. The resulting maps were often decried as being blatantly “racially gerrymandered” (Shaw v. Reno, 509 U. S. 630, 1993). They did frequently take on very convoluted shapes and proportions. All semblance of “compact” went out the window and some were barely contiguous. The 12th Congressional District of North Carolina was the most famous example since it was 165 miles long, followed Interstate 85 down a long narrow corridor from one city to another to take in an adequate number of African-Americans to make sure that they had a minority majority in that district. Naturally these districts, and the whole concept was attacked in federal court by, among others, white voters who charged that these districts violated their own rights to equal protection and that they were an example of “reverse discrimination” (Shaw v. Reno, 509 U. S. 630 1993,). “In 1993, the United States Supreme Court declared that racially gerrymandered districts were subject to strict scrutiny under the equal protection clause- which means that they can only be justified by a ‘compelling state interest’ and must be ‘narrowly tailored’ by the state to serve that interest” (Shaw v. Reno, 509 U. S. 630, 1993) quoted in Schmidt, Shelley, and Bardes, 1999, 397). In short, “Shaw I”, as this case is termed suggested that race could not be the only consideration in the legislature’s drawing of district lines. This would constitute a “racial gerrymander” which would violate the 14th Amendment. The fight has continued since that important case. Subsequent rulings by the courts have indicated that race cannot be the sole or even the predominant factor in the construction of congressional districts. Three years later in “Shaw II” the court again invalidated a proposed plan out of North Carolina because it found that race was the “predominant consideration” in the drawing of the proposed majority-minority district lines (Shaw v. Hunt, 517 U. S. 899, 1996). However, race can be one of the factors taken into account when the mapmakers do their work providing that the map can stand up under the “strict scrutiny” test and that the map serves a compelling state interest (Miller v. Johnson, 515 U. S. 900, 1995; Bush v. Vera, 116 S. Ct 1941, 1996). In addition, as explained by the National Conference of State Legislatures, there are some guidelines which can be followed by practical decision makers who want to follow the court’s directives. They are as follows: “...a state’s redistricting plan is subject to strict judicial scrutiny only if race is the dominant motive for the final shape of the district. If a state used ‘traditional districting principles’- often more aptly called ‘traditional race-neutral districting principles’- as the primary basis for creating a district and race is simply one of many considerations, the plan will not be subject to strict scrutiny. If that plan is challenged a state will only have to show a rational basis for the district’s shape....Since 1993, several policies or goals have been judicially recognized as ‘traditional districting principles:’ \*Compactness \*Contiguity \*Preservation of counties and other political subdivisions \*Preservation of communities of interest \*Preservation of cores of prior districts \*Protection of Incumbents and \*Compliance with Section 2 of the Voting Rights Act” (National Conference of State Legislatures, 1999, 73-74). North Carolina finally got off the hook with the Supreme Court with the “Cromartie II” case which held that race could be a consideration in creating majority-minority districts but not the only factor. Race had to be linked with politics, i.e. partisanship to be upheld and that factor is discussed below. Since there is a high correlation between race and voting patterns in the South, this opens up a lot of options (Hunt v. Cromartie, 121 S. Ct. 1452, 2001).

Naturally those who do the practical work of drawing up the redistricting maps, and those who do the political negotiations and compromise necessary to effectively pass a map through the state legislature and by the governor must begin with a keen eye toward the majority-minority rules of the game established in this series of somewhat convoluted court decisions. That is why the business of taking care of the majority-minority district line drawing must be high on the agenda at redistricting time; however, as the list above makes clear, there are other factors which are fair game and will also be given careful attention.

### **Partisanship (or “Party Fairness”) and Competitiveness**

Considerations of partisanship and competitiveness go hand in hand. Indeed, the current consideration in several states of re-opening the redistricting battle at in the middle of the decade, based on the success of the DeLay plan in Texas, are all being rationalized in terms of various definitions of what is a “fair” level of representation for the two major parties in several states, most notably Georgia and California (Benenson, C. Q. Politics Weekly, February 25, 2005). That partisanship has also moved to Illinois where two Democrats in the U. S. House of Representatives have suggested that Illinois should follow the DeLay example and redistrict at mid-decade based on Democratic gains in that state. The suggestion has not been widely supported by key members of the Illinois General Assembly even though Illinois typically has been one of the most competitive and most partisan states (Bush and Pearson, Chicago Tribune, March 7, 2005) Traditionally partisanship has played a key role in the long history of disputes about the size and shape of legislative districts. Partisans wage fierce struggles to gain the ability to define districts likely to achieve partisan advantage. The very definition of “gerrymandering” entails the idea that some sort of political shenanigans were employed to gain unfair advantage for one party or another. However, while recognizing the inevitability of partisanship being a key consideration, defining what is “fair” and “unfair” partisan consideration is not at all simple. The cleanest operational definition of that concept is what political scientists term the “votes to seats” ratio. That is, in a theoretical sense it is possible to define electoral systems where the popular vote percentage for one party statewide would also translate into that party’s controlling the same percentage of the seats in the state legislative bodies or in the congressional delegation. In the real world of practical politics, something akin to that notion seemed to be embedded in the appeal that Texas Republicans led by Majority Leader Tom DeLay used in demanding that their new majorities in the Texas Legislature, and their control of the Texas Governorship, should be grounds for an unprecedented redistricting of the entire state in 2004 to achieve their “fair share” of the Texas Congressional delegation. It was a ploy which worked extremely well from the standpoint of Texas Republicans whatever its basic grounding in intrinsic notions of the kind of representation required in a republic which is also democratic.

The ideals of party fairness and an accurate reflection of the competitiveness of the parties are bound up in the fundamental electoral rules of the game adopted by the states and by the national government. The ideal of competitiveness entails the concept that elections can make a difference and that there should be a relatively large number of competitive seats where regular partisan turnover is possible. Otherwise it is difficult for public opinion and the outcomes of periodic elections to have much impact on the course of public policy making. It is possible to devise an electoral system with considerable probability of the vote to seat ratio being in something like mathematical balance. This system is known as “Proportional Representation” (P.R.) which is used in a number of European nations. The P R system, almost by definition, is an attempt to ensure that the party which receives the most votes gets the most seats in the Parliament, the next most votes, the next most seats, etc., etc. In addition, the votes and seats should be in proportion, i. e. 60% of the popular votes should result in 60 percent of the seats, 30% of the votes should produce 30% of the seats, etc. The current conflict in Iraq, where the Shiite, the Kurds, and the Sunni ethnic and religious groups are attempting to use some form of P R to ensure representation for each group in approximate ratio to its percentage of the nation’s total population is a recent case of such a system applied in the making of a new constitution and the formation of a new government. In reality, this mathematical precision is very difficult to attain. In most real world electoral systems there is a bonus which accrues to the party which attains the most votes. The party which attains the most votes usually gets even more seats in the Parliament even under P R.

In the United States we have experimented with various forms of Proportional Representation. For instance, the city council elections in New York City up through the mid-1940s required Proportional Representation. Since New York also had multiple parties which were viable at the time, this scheme usually resulted in a variety of groups, in addition to the Democrats and the Republicans, being represented on the city council (Hershey and Beck, 2003, 37-49). Translating mass



preferences, values, and views into effective political power is the challenge here and it is the challenge of any electoral system which is worthy of being called “democratic”. The use of Proportional Representation, however, has not been particularly widespread in the United States. We have also experimented with various forms of multi-member geographical districts which allows some flexibility in the P R direction. In Illinois our experiment took the form of the multi-member House districts used in the Illinois General Assembly. This electoral device was an original part of the 1870 Illinois Constitution which was in effect until replaced in 1970. The 1970 Illinois Constitution carried over the multi-member House districts, and they were in effect until a new system was put into place by the so-called “Cut Back Amendment” of 1980 in a political fight led by current Lieutenant Governor Pat Quinn. That amendment eliminated the multi-member House districts and also reduced the size of the Illinois House from 177 to 118 legislative districts with each State Senate district having contained within it the boundaries of two Illinois House seats. Those two seats, however, are elected separately and independently. In the old system, it was possible to guarantee in most House districts that the minority party in that district would have at least one seat and the majority party would control the other two. Thus, the partisan range was from one-third to two-thirds of the seats in the House no matter what the voting totals in the district might be. In some districts of Chicago, the Democrats controlled all three seats; however, the norm guaranteed some protection of the minority party’s position in every legislative district through the multi-member device. This also led to the election of more women and more minority candidates in some districts than would have probably been the case without this particular electoral device.

Most of the United States eschews all such esoteric electoral systems. We heavily rely on single member districts. We also usually rely on plurality elections, i.e. the candidate who gets the most votes wins the seat. This plan is clean and straight forward; however, it also leads to significant distortions of the vote to seat ratio most years and it almost always means that the party which gets the most votes gets a majority of the legislative seats out of proportion to its share of the popular votes. In other words, there is a nice bonus provided for winning. Our reliance on single member districts and plurality elections means that normative concepts of intrinsic fairness in the representational system are complicated and often take a back seat to the exercise of political interest and yield to raw political power. The courts have ordinarily recognized the inevitability of partisanship being at play when redistricting is done. They have usually decided that partisanship can be one factor, but not the controlling factor, in the drawing of district boundaries. The court has frequently looked carefully at charges of partisan gerrymanders and they have held that such a charge is a justiciable matter *Davis v. Bandemar*, 478 U. S. 109, 1986. The *Davis* case involved a conflict over the role partisan conflicts can play in redistricting. A plurality of the majority held that population should be the major consideration in state conflicts; however, partisan composition could also be considered. A minority of three justices (O’Connor, Burger, and Rehnquist) maintained that partisanship should be relegated to the political question realm and not be considered by the courts. They would not have held such cases to be justiciable and would not have recognized “partisan gerrymanders” as a part of the court’s business. (Justice Felix Frankfurter would have smiled in assent after warning against the court’s ever having entered this “political thicket”.) A working majority disagreed. In other words, partisanship is not singularly a political matter which the court will not adjudicate, but it can be challenged as an Equal Protection matter. In *Vieth v. Jubeliner* W L 894316, U. S. Pa., 2004, the court seemed to recognize that both partisanship and incumbency protection could be legitimate factors to consider in redistricting cases, providing the equal protection interests of racial minorities were not violated. In fact, a substantial minority of four members of the court in *Vieth* advocated overturning *Davis* maintaining that there were no standards which could be used objectively to prove a partisan gerrymander. Indeed, it is difficult, if not impossible, to separate partisan considerations from incumbency advantage where there are incumbents involved in the redistricting equation. (Bullock, Fall, 2004, 9-13).

## **Incumbency**

The courts have also allowed incumbency to be one of the guiding considerations when drawing up new district lines at both the state and federal levels. (*Abrams v. Johnson*, 117 S. Ct. 1925, 1997). There is almost always an advantage to being an incumbent in the United States, and being an insider in the redistricting process, or having someone else look after your interests in the process is one of the choice advantages. Under the redistricting processes now routinely used in the United States, it is often charged that, contrary to the assumptions of normative democratic theory, “the representatives select their constituents” rather than the other way around (Greenblatt, 2004, 22). This aphorism neatly captures the almost universal advantage incumbents have had in the refashioning of district lines. In California, the nation’s most populous state in 2002 immediately after redistricting, for example, there was only one competitive Congressional District, out of the 53 seats avail-

able that year. In 2004 there was none. In Illinois, in 2002, immediately after redistricting, there was only one competitive Congressional District. It was the 19th in southern and central Illinois, where two incumbents, Representative John Shimkus and Representative David Phelps, were thrown together in a consolidated district. It was a district which by mutual agreement between the leaders of the congressional delegation of the two parties, favored the Republicans and Shimkus won handily, as expected. In 2004, even though it was not the direct result of redistricting, one seat did change hands when veteran Republican Phil Crane was beaten by Melissa Bean in the 8th Congressional District; however, that one was widely considered to be an “upset” since incumbents rarely lose. Incumbents have to be in grave difficulty because of lack of service to the constituents, or the perpetuator of some significant personal indiscretion to put their seats in jeopardy, and that rarely happens.

The incumbents have such significant advantages that there are only a few, usually around twenty-five to thirty Congressional Districts nation-wide each election which are considered to be “marginal”, i.e. realistically winnable by either party. That means that ten percent, or less, of the seats theoretically available are really competitive each year at either the federal or the state levels. The others are virtually unassailable. Such significant incumbency advantages ensures that the relatively small scale shifts in public opinion related to public policy or the immediate issues of the day will not be captured in the electoral returns. Incumbents are largely insulated from the consequences of such changes in public opinion and thus do not have to be accountable at the ballot box. If most incumbents hold “safe seats”, usually defined as won with 55 percent or more of the vote in the last election, as most do now, then it is hard for the voters to use the casting of their votes as a way to achieve popular accountability (Greenblatt, 2004, 22). Only a major uprising, like the revolutionary changes in the Congress in 1994 when the Democratic majority of forty years was shattered by a tidal wave of Republican victories, can effect the kind of immediate change that elections are in theory supposed to be able to create. There must be a shift of very significant magnitude for enough seats to change partisan hands to move one party from majority to minority status. The Republicans have now controlled the U. S. House for more than a decade and there seems to be little prospect that majority control will change in the near term. Before that the Democrats had controlled the House for forty years. One of the major reasons is that incumbents have such overwhelming advantages and the redistricting process protects and enhances those advantages. Melissa Bean beating Phil Crane in 2004 and the Republicans ousting the Democratic majority in the House in 1994 both illustrate that under the right set of conditions such partisan shifts can take place at both the individual district and the total institutional levels, but such changes are rare.

### **The Illinois Constitution and Practice**

In Illinois, of course, the state constitution is the touchstone for redistricting under the framework of the federal laws and court decisions already sketched above. In this section we will review briefly those state constitutional requirements for redistricting and what has happened in Illinois in the three census cycles which have taken place since the 1970 constitution was promulgated. We will start with the constitutional provisions for redistricting found in Article 4, Section 3 as follows:

- “(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.
- (b) In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.”

The first two provisions seem simple enough and there is nothing particularly unusual about them. The legislature is clearly given the first crack at redistricting and if it can agree and pass a redistricting law by June 30th of the year following the new census, the process is over. However, if compromise cannot be reached, which is usually the case, a somewhat complicated set of next steps is required. The first of these steps is for the appointment of a Legislative Redistricting Commission of eight members, four from each party, appointed by the legislative leaders of the General Assembly, to develop a redistricting plan. That plan must ultimately obtain the vote of at least five members and must be agreed to by August 10th. Obviously, this provision was intended to produce a map with at least some bipartisan support. As it turns out, given the highly partisan nature of Illinois politics, this provision was almost guaranteed to produce stalemate which has been mostly its history.

If the bipartisan Legislative Redistricting Commission cannot agree to a new map by the deadline, things really get

interesting, and a little bizarre. At the point of stalemate, the Illinois Supreme Court is required to submit two new names for the Commission, one from each party, to the Secretary of State. “Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission”. Here we have the language providing for the unique tie-breaker in the Illinois Constitution. It is a “go for broke” or “winner take all” plan where one party potentially gets to promulgate its favorite map and the other party loses everything not protected by federal law. Reportedly the Illinois Constitutional Convention delegates believed that this system to be so much a gamble that it would focus the minds of the original Legislative Redistricting Commission and the General Assembly on the need for compromise and the need to produce a bipartisan map they could all live with if not embrace warmly. It has not turned out that way. This is a constitutional provision which the state may do well to reconsider given its somewhat unexpected history.

The first real test of the constitutional plan was the 1980 redistricting. That cycle was further complicated by the so-called “Cut-Back Amendment” which had been passed by initiative and which reduced the Illinois House from 177 to 118 members and which also eliminated cumulative voting in Illinois and changed to single member house districts instead. Redistricting would have been difficult even without this disruption and with the partisan and incumbent interest swirling, the conflict produced a partisan stalemate necessitating the use of the tie-breaker provisions for the first time. Two former governors, Sam Shapiro for the Democrats and Richard Ogilvie for the Republicans, were nominated to be the ninth member of the Legislative Redistricting Commission. In a grand bit of drama, then Secretary of State, Jim Edgar, drew the name of the Democrat out of one of Abe Lincoln’s stovepipe hats. The “nuclear option” or the “democracy by lottery” provision had been invoked for the first time. Not surprisingly, the Democratic version of the map was ultimately promulgated. This was only after further litigation before the Illinois Supreme Court and the U. S. District Court in Chicago where the courts required some modifications to be made in some minority districts, and this map controlled until 1991 (Report of the Redistricting Process Review Commission, 1999, 8). In 1981 the road to redistricting was a rocky one until the map was finally settled; however, the Illinois Constitution’s random selection plan was the ultimate arbitrator (Miller, 1987, Illinois Legislative Research Unit, 25-26).

In 1991 the work had to be repeated although the conflict engendered by the Cut-Back Amendment no longer hung over the heads of the General Assembly. As a result of their luck of the draw in 1981, and the resultant favorable map, the Democrats still controlled the majority in the General Assembly in 1991. They took the first step by approving a Democrat friendly map; however, when it was submitted to Republican Governor, Jim Edgar, the map was vetoed. As the Constitution provided, the Legislative Redistricting Commission was put to work drawing up a map. Again the Commission reached a partisan impasse and the “tie breaker” provision had to be implemented. Then Secretary of State George Ryan selected the Republican name, Al Jourdan, Chair of the State Republican Party, out of a crystal bowl (Report of the Redistricting Process Review Commission, 1999, 8). Not surprisingly, the reconstituted Commission drew a Republican leaning map. The map was challenged before the Illinois Supreme Court, and in a party line vote (4-3) the majority Democrats remanded the map to the Commission for adjustments. Marginal adjustments were then made by the Commission; however, it was still a Republican favorable map. When the inevitable appeal was filed one of the Democratic justices joined the Republicans on the court and accepted their edition of the map (Report of the Redistricting Process Review Commission, 1999, 9). This map controlled the elections to the Illinois General Assembly from 1992 through 2002.

At the time of the 1991 tie-breaker selection then Secretary of State (and later Governor) George Ryan expressed some frustration with the constitutional tie-breaker provision. Subsequently he appointed a new Redistricting Process Review Commission to study the way Illinois did the remap and to make recommendations about possible improvements, especially in the tie-breaker provision. This commission consisted of a diverse group of 22 people including legislators, former legislators, academics, and civic leaders. They were led by a prominent Chicago lawyer, Jeffrey Ladd; thus the popular name of the commission became the Ladd Commission. The Ladd Commission spent months studying the process, talking to the redistricting experts from throughout the nation, and holding 25 hearings throughout the state. While there were multiple points of disagreement on the Commission, it agreed on the need for change and ultimately wrote a report and made recommendations for a significant change in the redistricting process. (The senior author of this paper was a member of the Ladd Commission.) The crux of the Ladd Commission’s Report’s recommendations is in the following passage:

“Each legislative chamber would be allowed to redistrict itself by resolution adopted in that chamber by not less than a three-fifths vote. Should one or both chambers fail, then the responsibility for redistricting is transferred to the Il-

Illinois State Board of Elections. That board shall select specifications for a computer program that would redistrict the state's population according to prescribed criteria. The General Assembly shall have authority, by resolution of three-fifths of its members, to replace those computer specifications with its own, which would also have to meet the criteria stated in the Constitution. Otherwise, the specifications of the State Board would be applied to a computer program, which would draw separate redistricting plans- one for the House of Representatives and one for the Senate- to be certified by the State Board" (Report of The Redistricting Process Review Commission, 1999, 2).

The recommendations of the Ladd Commission were rather clearly designed to eliminate what they called the "democracy by lottery" feature of the current Illinois Constitution. It also was designed to make the process somewhat more technical and more neutral by turning it over to the State Board of Elections and providing for a computer programmed exercise designed to meet specific and recognized redistricting criteria. In this feature the new procedure would be much closer to some of the plans used in other states, such as Arizona and Iowa, which have been highly touted as being fairer and more bi-partisan in their implementation. Its most innovative feature was the decoupling of the Illinois House and Senate redistricting processes and the elimination of the requirement that each Senate seat had to have two House seats embedded in it and coterminous with it. However, because the plan itself required significant change in the way Illinois does business, most immediately a constitutional amendment, and because it lacked sufficient political support from the relevant leaders and since there was no groundswell of public demand for change, the report was issued, discussed perfunctorily, and died without a serious public debate and discussion.

History repeated itself in 2001. After the General Assembly failed to reach agreement on redistricting, the Legislative Redistricting Commission was appointed. It consisted of four Democrats and four Republicans. Not surprisingly, they failed to agree and the tie-breaker provision had to be initiated again. Again, with this time Secretary of State Jesse White presiding, the name of the Democrat was drawn randomly. The result was that the Democrats, led by Speaker of the House Michael Madigan and then Minority Leader (now President) of the Senate Emil Jones, were able to draw a new map which favored the Democrats. Interestingly enough, despite the Democrats' control of the House, they followed the usual script and allowed the Congressional leaders to draw up the remap for the Illinois Congressional Districts. Even though Illinois had gained population during the 1990-2000 decade, they fell just a few thousand votes short of protecting their 20 seats in the U. S. House of Representatives. Faced with the pending loss of one seat, the congressional leaders agreed upon a map which essentially protected incumbents first and foremost. It also met the Voting Rights Act requirements for safe seats for substantial African-American and Hispanic concentrations in the Chicago region. The only problem was that when the map finally played out in southern Illinois, two incumbents, Republican John Shimkus and Democrat David Phelps, were thrown together in a single reconstituted district, the 19th District. The district was clearly leaning toward the Republicans from the start, and subsequently Shimkus defeated Phelps handily in the general election (Jackson, 2003). This meant that the U. S. House delegation which had been 10 Republicans and 10 Democrats went to 10 to 9 in favor of the Republicans after the 2002 elections. This imbalance provided the fodder for some discussion of the potential for another mid-decade remap in light of the successful adventure of Tom Delay and his Republican colleagues in Texas. However, Illinois Democrats generally were unenthusiastic, or downright hostile toward following the Texas model despite their control of both houses of the General Assembly and the Governor's office after 2002. (Beneson, C Q, Feb. 25, 2005. In 2004 the victory of Melissa Bean over Phil Crane shifted the Illinois delegation to 10 to 9 in favor of the Democrats. In Illinois at least there is a clear disconnect between the mechanics and the dynamics of the congressional process and the state process.

In summary, the Democrats have won two and the Republicans have won one of the tie-breakers. Who knows what 2010 will bring if it goes to the random process then?

## **Conclusion**

There is no question that redistricting has become a topic of national significance recently and that there is a mid-decade dialogue which is unusual for the 20th or the 21st century. Not since the Baker v. Carr decision in 1962 has there been so much interest in the esoteric factors which condition the redistricting decisions. This mid-decade interest was undoubtedly fueled by Majority Leader Tom DeLay's successful intrusion into the Texas remap conflict in a manner which strengthened the Republicans' margin in the U. S. House of Representatives as well as their hand in the Texas legislature. Since then Republican Governor Arnold Schwarzenegger in California has announced an initiative designed to get California a new redistricting plan. Governor Schwarzenegger wants to turn the job over to an independent commission which would be made up

of retired judges. In some respects the Schwarzenegger plan resembles the more neutral "Boundary Commission" approach used in both Great Britain and Canada. It could potentially benefit Republicans; however, the incumbent Republicans from California are none too eager to upset the current balance of power under which they have personally prospered. That is the almost universal reaction of incumbents everywhere and the reason it is difficult to effect fundamental change in this volatile area. Georgia Republicans who took over the legislature in 2002 have also launched a drive to change the Georgia power equation in mid-decade to accomplish what they feel would be a more equitable map which would reflect their new found strength in Georgia. Most recently a Florida Democrat, Betty Castor who lost a very close U. S. Senate race to Republican Mel Martinez in 2004 has announced a drive to change the Florida constitution regarding the way both congressional and state legislative map lines are drawn. Since Florida almost intrinsically defines a closely divided and competitive state, it is interesting to note that Florida Republicans hold a commanding 18-7 advantage in Congressional seats and the Florida legislature is heavily controlled by the Republicans in both houses. So, the Castor example shows that it is not just the Republicans who are interested in rewriting the rules of the game for drawing the map (Beneson, C. Q. February 25, 2005).

In effect, we are left with a complex mixture of factors influencing the redistricting formula. The equal population rules are apparently bright lines which cannot be violated at the Congressional District level and these population lines have been drawn up most tightly in the case of the state legislative districts. The game must be played out inside those very narrowly defined lines of combat. Then additional rules come into play next. The first of those are the necessity of providing for "majority minority" districts under the 1965 Voting Rights Act and its amendments. That has proven to be a complicated and conflict ridden series of rules. It may mean, in effect, that those special representation considerations must come first in the map-makers work and the remainder of the state's district lines become residual categories which must be fitted like a jigsaw puzzle into some very irregular district boundaries in a state shaped like Illinois, especially downstate where the rivers form the east, west, and southern boundaries. Within those very real constraints, the mapmakers are then left some degrees of freedom to take care of the interests of incumbents and of partisans. This is where most of the drama and political conflict is played out. The relative handful of seats and districts which result from the mapmakers' craft and from the compromises engineered by the political leaders produce the very short list of potentially marginal districts where control of the majority in both houses of the General Assembly is likely to reside. It also produces a very few potentially competitive Congressional Districts either in Illinois or nationally every ten years. In Illinois that number has been only one in the 2002 and 2004 elections, and nationally the turnover rate is less than 10 percent for the U. S. House in any given election. In the state elections the number of potentially marginal seats is also very small, only three to five ordinarily in any given election. If one uses competitive elections as a yardstick to define the meaning of American democracy, that yardstick has some real flaws in the redistricting area. If we do not have competitive elections it is almost impossible for the people to hold their rulers accountable and for public opinion to play much role in the making of public policy. If the leaders choose their constituents, as is increasingly the case, and if our parties are ideologically polarized in left and right war camps, as is increasingly the case, it is more and more difficult to reach compromise and bi-partisan consensus on the major issues which face the state and nation. The office-holders are especially fearful of drawing a primary opponent so they endeavor to keep their core constituency placated and that core constituency is very conservative in many of the Republican districts and very liberal in many Democratic districts. The partisan districts are drawn to magnify those ideological values. In many geographical areas of many states this makes it is harder to elect the more moderate members of either political party. Thus, party and ideological polarization feeds on itself and grows more intense. Given these political and legal circumstances, it may be an opportune time to start examining some structural changes which could improve the system. This paper is an initial attempt to start that important dialogue in the State of Illinois here in mid-decade before the ten year cycle runs its course and makes it almost impossible to effect change nearer to the next redistricting cycle. In an era when the United States is attempting to encourage democracy, and democratic procedures in much of the rest of the world, it is appropriate to look for ways to improve and perfect our own practice of that most laudable goal.

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